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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1970

No. [redacted] 245

WILLIE CALVIN JACKSON, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

Petition For Writ of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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JUNE 5, 1970

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COMES NOW WILLIAM L. BERLAT, attorney for the Petitioner, and hereby petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case, entered on March 5, 1970.

OPINION BELOW

The opinion of the Court of Appeals is set forth in the Appendix but is not yet reported in the Federal Reporter.

JURISDICTION

The judgment of the panel of the Court of Appeals was entered on March 5, 1970. A petition for rehearing en banc was denied on April 29, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a Customs Officer, not conducting a border search needs "probable cause" that a crime has been committed or that contraband exists in order to stop a motor vehicle for the purpose of searching said vehicle and/or arresting the occupants of said vehicle for possession of contraband. Or is a lesser standard, such as mere suspicion, all that is required for such a stop?

2. Whether, assuming that probable cause is required for stopping a motor vehicle, the facts and circumstances of this case show the existence of probable cause to believe a crime to have been committed or that contraband was present before the customs officers undertook to stop the vehicle in question occupied by Petitioner.

STATEMENT

The statement of facts in this matter begins with the date of January 9, 1968, when one Emmett Walters and the Petitioner herein, Willie Calvin Jackson, met at a cafe in Phoenix, Arizona. At that time Walters and Jackson decided to drive to Nogales, Arizona, in order to "have a little fun."

Upon arriving at the Arroyo Motel in Nogales, Arizona, Walters went in and registered under the ficticious name of "Louis Brown" in behalf of both men. Walters put no license number down on the motel registration form, having no particular reason for doing so, since the automobile belonged to Petitioner Jackson who at that time was asleep in the vehicle.

At some point in time, the precise time not being material to this matter, Walters had made arrangements

with a Mexican man and an unknown girl apparently for the purpose of having the girl come to Jackson and Walters' room at the Arroyo Motel.

A short while after Jackson and Walters had checked into the motel, the Mexican man and the unknown girl came to the motel room, and the Mexican man then left shortly thereafter, the girl remaining behind. The girl remained in the room with Walters for about an hour, and at no time prior to this had Petitioner awakened and left the car. Some time after the girl left, however, Jackson awakened and he and Walters at that time left the motel area together.

On this very same day, January 9, 1968, Mr. Swindler, a United States Customs Agent, was informed by Mr. Romney, the owner-operator of the Arroyo Motel, that "a man" had arrived *on foot* and requested a room for two hours. Romney also informed Agent Swindler that "this man" had registered under the name of "Louis Brown." Romney also informed Agent Swindler that "this man" did not give a license number in the appropriate space on the registration form. Mr. Romney further informed Agent Swindler that "this man" had later removed an automobile from one vacant spot in front of the motel and placed it in another space immediately in front of the room which he had just rented.

Agent Swindler arrived that same day at the motel at approximately 10:10 p.m. At that time Agent Swindler was told by Mr. Romney about the arrival and departure of the Mexican man and the unknown girl.

Agent Swindler with this information made a check of the license number which Mr. Romney had noted on the vehicle which had been placed in front of the room which had been rented by Jackson and Walters

and found that it was registered to WILLIE CALVIN JACKSON, Buckeye Road, Phoenix, Arizona, the Petitioner.

Approximately 18 days later, Jackson, the Petitioner, informed the co-defendant in this matter, Roberto Hernandez-Macias that he intended to make a trip down to Mexico shortly thereafter. Some time prior to that time, Macias had requested that the Petitioner Jackson take him along the next time that Jackson went to Nogales, Mexico. One day later, Macias and Jackson started the 170 mile trip from Phoenix, Arizona, to Nogales, Mexico. On that day, Petitioner Jackson was feeling quite sick, having become intoxicated the evening of January 29, 1968. In this connection, Jackson informed Macias that he did not feel well enough to cross the border into Mexico.

Jackson at this time told Macias that he would register at the Arroyo Motel as "James Smith." Macias indicated that he was going to go ahead and cross the border into Mexico in order to buy some shrimp. At approximately 5:50 p.m., January 30, 1968, Jackson drove up to the Arroyo Motel in Nogales, Arizona, and parked his vehicle in an empty space. Petitioner Jackson at that time registered under the name "James Smith," a name which he testified later that he used frequently in order to "avoid trouble with girls." Jackson did not put his license number down, went back to his car and moved it over in front of the room to which he had been assigned, and retired to his room after taking medication for his upset stomach and headache.

At approximately 7:50 p.m., Macias called Jackson at the motel, and told him that he was ready to return to Phoenix. He also told Jackson that he was "just around the corner." Some time during the two hour

period between 5:50 and 7:50 p.m., Mr. Romney called Agent Swindler and informed him that *the same man* who had registered as "Louis Brown" on January 9, 1968, *was back again*, and this time had registered as "James Smith." Mr. Romney also told Agent Swindler that no license number was given and that a vehicle had been moved from one spot to a space immediately in front of the room to which Jackson had been assigned by the motel clerk.

Based upon this information, Agent Swindler established a surveillance of the motel area. This was about 8:00 p.m., January 30, 1968. In this connection, Agent Swindler requested that Mr. Romney "signal" Agent Swindler by walking out to the swimming pool and returning to the motel office in the event that a call came to "James Smith." The call of course came from Macias to Jackson whereupon Jackson got into his car, drove directly around the corner on to Bankard Avenue, in Nogales, Arizona, and picked up Macias.

At this point, Agent Cavitt, who had been in radio contact with Agent Swindler, followed the Petitioner's vehicle, which made three or four turns in the area of the Arroyo Motel, then proceeded in a southerly direction, and then made a U-turn in the middle of the street and proceeded north, which would be the direction of Phoenix, Arizona, from Nogales, Arizona. Jackson and Macias were proceeding north at this point on Highway 89, and shortly behind them in unmarked cars were the uniformed agents Cavitt and Swindler who apparently had followed the vehicle continuously from the time that it had left the Arroyo Motel.

After following Jackson's vehicle for some distance, which apparently was approximately 14 or 15 miles from Nogales, Arizona, Agent Swindler displayed a pulsating-

flashing red light, and at this time Jackson was travelling approximately 60 miles an hour, and was driving his own vehicle.

After the red light was flashed, Agent Cavitt, who was travelling immediately behind Jackson, noticed Macias apparently turning around and subsequently opening the door on the passenger side briefly, the interior light of Petitioner's car having flashed for just a second. Shortly thereafter, Jackson slowed his vehicle down and stopped.

At this time Agent Cavitt approached the Petitioner and told him to get out of the automobile, whereupon Agent Cavitt conducted a frisk search of both Macias and Jackson. At this same time, Jackson was told to get in front of his automobile and put his hands on the hood. At this point Jackson asked for his sweater, and Agent Cavitt who had already started his search of the automobile, reached down to the right rear floor of the vehicle behind the passenger seat for the purpose of picking up Jackson's sweater, and at that time found a package lying on the floor.

Agents Cavitt and Swindler at that time examined the package, and determined that it contained heroin. At this point in time, and for the first time, Macias and Petitioner Jackson were informed that they were "under arrest."

Macias and Jackson were thereupon taken to the Santa Cruz County Jail, which is in Nogales, Arizona, and were incarcerated therein. They were later indicted by a grand jury for violation of 21 U.S.C. Section 174 which makes it a crime to knowingly import or facilitate the importation, sale or transportation of heroin or other narcotic drugs from another country. Petitioner as well

as the other person indicted with him, Mr. Macias, was convicted of the offense after a jury trial and the conviction was affirmed, as mentioned above, by the United States Court of Appeals for the Ninth Circuit.

Prior to the trial of this action, a hearing was held on a motion to suppress at which many of the facts stated above were brought out, as well as admissions by the customs officers who stopped the Petitioner, that the vehicle was being stopped in order to make a search and *not* because of any allegation that a traffic violation was being committed or any other offense other than the suspicion which the officers had based on the facts stated above, that Petitioner possessed heroin. Further reference to the motion to suppress and the facts and admissions involving said motion will be found in the argument below.

REASONS FOR GRANTING THE WRIT IN ARGUMENT I

Probable cause, and not mere suspicion, that a crime has been committed and/or that contraband is in a vehicle is necessary for a police officer to stop a vehicle on a public street by the use of flashing red lights and/or siren.

The Fourth Amendment to the United States Constitution requires the existence of probable cause to believe that a crime is being committed, or has been committed, before an arrest can be made by the stopping of an automobile. Such probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed. *Henry vs. United States,* 361 U.S. 98 (1959). Probable cause is the very minimum requirement for stopping an automobile on the highways if the search

is not to be in violation of the Fourth Amendment to the U.S. Constitution. Specifically, it is the facts and circumstances within the officer's knowledge that determine probable cause. *Hamer vs. United States*, 259 F.2d 274; certiorari denied, 79 S.Ct. 799, 359 U.S. 962, 3 L.Ed. 2d 769.

Indeed the burden of proving probable cause rests with the government. *Cervantes vs. United States*, 278 F.2d 350, Ninth Circuit (1960).

When a search warrant has not been obtained, evidence needed to establish probable cause to conduct a valid search need not be sufficient to prove guilt, but on the other hand, rumor, suspicion, and even strong reason to suspect are not sufficient to constitute probable cause. *U.S. vs. Peisner*, 311 F.2d 94. Further in that connection, in stopping an automobile *for the purpose of searching it*, the officer must be in possession of facts sufficient to warrant a man of reasonable caution to believe that a crime is being, or has been, committed. *Hernandez vs. United States*, 321 F.2d 283, Ninth Circuit (1963). Bare suspicion is not sufficient to establish probable cause, and a search may not be used as an investigative technique for securing evidence of the commission of a crime. *Hernandez vs. U.S.*, 353 F.2d 624, Ninth Circuit (1965).

Brinegar vs. United States, 338 U.S. 161, 69 S.Ct. 1302, 93 L.Ed. 1879, and *Carroll vs. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543, both require that probable cause exist at the time that the vehicle was stopped. Cf. *Amador-Gonzales vs. United States*, 391 F.2d 308, Fifth Circuit (1968).

The requirements for probable cause to stop, arrest, or search an automobile or a person, or other place, are analogous to those requirements upon which a magistrate

must base his issuance of a search warrant. *Aguilar vs. Texas,* 378 U.S. 108 (1964). Furthermore, in *Beck vs. Ohio,* 379 U.S. 89, it was held that there was no probable cause for an arrest since the officers testified only that they had information and "heard reports" that the defendant was engaging in illegal activities, although they did not state exactly what information or report the officers had received from their source. The test was stated to be that facts must be available at the moment of the arrest (or search) sufficient to warrant a reasonable man in believing that an offense had been committed. Also, *Chen Kay vs. United States,* 311 F.2d 317, sets forth the test that an officer's knowledge and reliable hearsay must be sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed.

It is absolutely certain that hunches, suspicion, intuition, and such other weak bases are not sufficient, absent a clear tint of criminal activity, even in the presence of surveillance. Ambiguous conduct such as discussions with "known underworld characters," walking down dark alleys, frequenting places or areas where crime is known to exist, etc., are simply not sufficient to give rise to probable cause to make arrests and searches.

Likewise, furtive movements such as walking up and down staircases with packages concealed under one's coat, maintaining a hand in a pocket, glancing around, or even driving in a circuitous route are not in and of themselves conduct which gives rise to probable cause for the making of an arrest or any search which may be later involved.

ARGUMENT II

The facts and circumstances in this case show that there was no probable cause for the actions of the officers in stopping this vehicle.

In this case the government, at the time of the motion to suppress, recognized that its action in stopping and searching the vehicle could not be sustained on the theory of a border search, discussed infra, and therefore, attempted to justify its behavior by proving that probable cause existed to believe narcotic drugs were being unlawfully transported and imported.

. . An examination of the record, however, in this case fails to disclose any evidence of any kind or information of any character which would have justified Agents Swindler and Cavitt in securing a search warrant either for the motel room at the Arroyo Motel, or for the Petitioner's automobile.

While it is true that in *Carroll vs. United States*, supra, this court liberalized the rule governing searches when a moving vehicle is involved, and thereby obviated the necessity for obtaining a search warrant in the case of such, the court merely relaxed the requirements for a warrant on grounds of practicality. It is perfectly obvious that a moving vehicle, or one that is observed to be in the process of being moved, does not permit officers to commence a search for a magistrate in order to get a search warrant issued, even if there exists probable cause to obtain such warrant. The requirement of probable cause is never dispensed with, and in that connection Petitioner cites *Henry vs. United States*, 361 U.S. 98 (1959). In *Henry*, the court commented at Page 101 of its opinion:

". . . It was against this background that two scholars recently wrote, 'Arrest on mere suspicion

collides violently with the basic right of human liberty.'"

In this connection Petitioner respectfully calls this Court's attention to page 20 of the record of the motion to suppress of March 11, 1968, which reads in pertinent part beginning at line 13 of page 20 as follows:

"Q—You say you put on your red light and siren, is that correct?
A—Yes, sir.
Q—You couldn't stop the car?
A—No, sir, he refused to stop.
Q—Was he speeding?
A—At one point he was doing 80 miles an hour.
Q—What were you going to stop him for?
A—To search the vehicle.
Q—That was the paramount purpose?
A—Yes, sir.
Q—You didn't have a search warrant, did you?
A—No, sir, I did not."

It is absolutely certain that the government agents at that point had no basis whatsoever on which to base a search of the automobile, much less an arrest of the Petitioner by the stopping of his automobile.

It was stated by the Honorable Judge Dunaway in the opinion below, at page 3 of the opinion:

"This Circuit has already considered the effect of flashing red lights in order to stop a vehicle. In *Wilson vs. Porter*, 9 Cir., 1966, 361 F.2d 412, we said: 'We conclude that no right of the Appellee was violated when the officers stopped the car and that the subsequent seizure of the evidence upon which he was convicted was justified as pursuant to a lawful arrest. While it is clear that at the time Appellee's car was pulled over probable cause for

an arrest did not exist, it is also clear that not every time an officer sounds his siren or flashes a light to flag down a vehicle has an arrest been made."

This is not the law, and to the extent that the Ninth Circuit Court of Appeals has held in the opinion below, or in the *Wilson* case, supra, that the stopping of an automobile does not constitute an arrest, the Ninth Circuit is in error. By way of distinguishing the *Wilson* case, in any event, the holding of that opinion was that where police noticed the defendant drive by in his automobile at inordinately slow speeds several times during pre-dawn hours, and followed and stopped his automobile for purposes of routine investigation and then noticed what appeared to be a gun barrel in the automobile, the seizure of the gun from his automobile, the arrest of the defendant and the seizure of a dagger from defendant's person did not violate the defendant's Constitutional rights, and the gun and dagger were admissible in his prosecution in state court for possession of firearms by a felon and for possession of a concealed dagger.

It is perfectly obvious that *Wilson* can be distinguished on these facts; the law being clear in all jurisdictions that evidentiary items which can be seen by officers who have stopped a car and which are contraband, or otherwise unlawful, are properly seized *if the arrest itself is lawful.*

To the extent that *Wilson* permits the stopping of a vehicle, by officers, as "routine investigation," based on nothing more than slow driving, in pre-dawn hours, then the case is in conflict with previous Supreme Court decisions in that respect. The Honorable Judges of the Ninth Circuit Court of Appeals in applying this case said that there was nothing unconstitutional in the brief

detention of citizens under circumstances not justifying an arrest, and indicated further that a "founded suspicion" is all that is necessary. It is patent that such flies in the face of the mandates of this Court.

In *Henry*, supra, the facts were extremely close to those of this case. To briefly review those facts, two F.B.I. agents were involved in the investigation of the theft of an interstate shipment of whiskey in Chicago, Illinois.

In connection with their investigation and while they had a certain tavern under surveillance, they saw the appellant therein, Henry and one Pierotti walk across the street from a tavern and get into an automobile. Prior to this time the agents had been given information by Pierotti's employer of an undisclosed nature concerning the implication of Pierotti with the interstate shipment. The agents followed Henry's car, saw it enter an alley and stop. Henry got out of the car, went to a residential area and returned a short time later with "some cartons." He placed them in the car, and he and Pierotti drove off.

The agents were unable to follow the car at that time, but later found it parked near a tavern. Again, Henry and Pierotti drove off, stopping in the same place as before and Henry again went in and returned with more cartons. At this point in time the agents were approximately 300 feet away and could not determine the size, the number, nor the contents of the cartons. As the car drove away this time, the agents followed it and waved it to a stop. The agents searched the car, took out the cartons and placed them in the government vehicle and took Pierotti and Henry to jail. The cartons later proved to contain stolen radios. At this time Henry and Pierotti were placed under arrest.

It was perfectly clear on review to this Court that the officers had in effect relied upon what was later found after an unlawful arrest to justify the arrest. That is the precise reason that Petitioner herein asserts that his arrest was unlawful. It would be difficult to imagine a more analogous fact circumstance than the one presented to the court herein. The law of *Henry* is compelling and pervasive, and its effect has not been watered down or changed by this Court in any fashion since the decision was rendered in 1959. The court at page 103 of the *Henry* opinion wrote as follows:

> "The prosecution conceded below, and adheres to the concession here, that the arrest took place *when the Federal agents stopped the car.* That is our view on the facts of this particular case. When the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case, was complete." (Emphasis supplied, footnote omitted)

In *Katz vs. U.S.*, 389 U.S. 357, 88 S.Ct. 507 (1967), this Court said:

> ". . . This court has never sustained a search upon the sole ground that the officers reasonably expected to find evidence of a particular crime, and voluntarily confined their activities to the least intrusive means consistent with that end."

It is obvious that a search which turns up contraband must stand or fall upon the legality of the preceding arrest. If an arrest is made without probable cause, the evidence seized must be suppressed. *DuPree vs. United States,* 380 F.2d 283 (1967). Cf. *Brinegar vs. United States,* supra.

In *United States vs. Burhannon,* 388 F.2d 961 (1968), a Seventh Circuit case from Indiana, at page 962 the court said:

> "We think that the arrest here took place when the police car stopped the taxicab and that what occurred thereafter cannot justify the arrest, if it was unlawful when made."

The facts in *Burhannon* were likewise quite similar to those in the instant case. In that case the officer's testimony was to the effect that on the day of the arrest of the defendant, he observed Burhannon come down the stairs of his residence with his hand in his coat. He further testified that the defendant "glanced around" and entered a taxicab. The officers stated at that time that there was only suspicion that Burhannon possessed narcotics. As Burhannon entered the taxicab the officers drove to the scene and stopped their car so as to prevent the taxicab from moving. After the police car was stopped, one of the arresting officers saw Burhannon lean forward in the cab and make a motion with his hand down toward the floor board. In attempting to justify the conduct of the officers with respect to Burhannon's subsequent arrest, they relied upon Burhannon's previous narcotics conviction, information from a "reliable informer" and intermittent conversations with Burhannon by the officers; intermittent surveillance of his place of residence for approximately one year, and in addition his "suspicious conduct" just prior to the arrest. A comparison of the facts in *Burhannon* with those herein indicates that the government had approximately five times as much evidence and information upon which to base probable cause as did Agents Cavitt and Swindler prior to their arrest of Petitioner Jackson. On facts quite similar, the court said:

> "We conclude that the information available to the police at the time of the arrest was too vague and remote from the date of the arrest to give the police probable cause to believe that Burhannon

was in the possession of narcotics when arrested."

It is very difficult to accept the government's theory herein that two conversations with a motel owner some 18 days apart with respect to someone on one date registering under an assumed name, and at a subsequent time someone else likewise registering under an assumed name, was sufficient probable cause to arrest Petitioner Jackson.

Particularly disturbing are the reasons given by the learned trial court judge below for denying Petitioner's motion to suppress, and in that connection the Court's attention is respectfully called to page 39 of the transcript of proceedings of the Motion to Supress and beginning at line 7 thereof which reads as follows:

> "I think that there is one thing that has to be taken into account on these cases and that is that Nogales, Arizona is the gateway of all narcotics business into Arizona. We sit here day after day we try these cases and we know from the trial of them and from the press reports that are made of searches and arrests that this is the gateway. So when you are talking about they get the narcotics and import it, they receive it immediately on this side of the line and it is the harbor of narcotics traffic in this area. So when you are considering the case of this type, you are bound to take that fact into account down there in evaluating the evidence.
>
> Now, here Mr. Swindler is advised on January 10 of a very peculiar happening at a motel there at the border, that a man came in on foot, he registered, said 'I will only be here two hours' and the motel owner said 'You will rent it for the night,' immediately he left the motel and showed up with an automobile. I think he said a brown over white or white over brown; although he walked into the place, he came in with a car, was there very briefly and registered at that time under the name "Louis

Brown." His peculiar conduct caused the motel manager to alert the customs people that this is a very suspicious conduct here, the fellow has been here, only wanted it for two hours and I believe at that time there was some statement that a Mexican man had visited him and shortly thereafter he left. The license plate, the registration of the vehicle is checked, and it is registered to a Willie C. Jackson. In other words, Louis Brown and the registered owner are apparently different people. Well, on the 30th of January, back comes the same man, but he gives a different name, he is not Louis Brown, now he is James Smith. And again he fakes a registration and goes out, comes back with a vehicle. He is there long enough to get a telephone call about 8 o'clock and then he goes out, he is observed by customs agents, which is reported to Mr. Swindler, contacting a Mexican man, the Mexican man gets in the car and they make a few passes around Nogales and head out the highway.

I feel that with that background, with that information, again the registration is checked and again it is a Willie C. Jackson, it is not Louis Brown, it is not James Smith. And this very odd conduct in that Nogales area and right in the vicinity of the border, I believe that the customs agents had a personal reasonable proof under the same circumstances, in my judgment would feel there was reasonable ground to believe that the transactions involving narcotics or contraband was involved with that vehicle and that they had probable cause to stop the vehicle and to search it.

Now, there isn't as much needed for a search of a vehicle in the circumstances like this as there would be to arrest the people. In other words, there had to be a stronger case in order to stop the people and arrest them than there is needed to just search the vehicle and in the circumstances here. For that reason the Court finds that there was probable cause for the stopping and searching of the vehicle and

accordingly the motion to suppress of each defendant is denied."

There was no border search involved in this case, and such was conceded by Judge Walsh, page 2 and footnote 2 of the slip opinion of the United States Court of Appeals for the Ninth Circuit, and by Miss Jo Ann Diamos, Assistant U.S. Attorney, at the motion to suppress. There must always be a showing that a vehicle has crossed the international boundary line in such cases. *United States vs. Echevarria Garcia,* 415 F.2d 1141 (1969).

Petitioner believes, however, that the trial judge, as well as the Ninth Circuit Court of Appeals, was unduly influenced by the fact that this search occurred a few short blocks away from the international border, perhaps with the added impetus of "Operation Intercept," and a general feeling that Nogales, Arizona, is a "hub" of narcotics activity.

In many respects, this confusion at both levels below leads Petitioner to urge that there is some confusion in this area as to exactly what constitutes probable cause. Certainly, judicial notice that a certain area is a "dangerous area" or an area known to be fraught with criminal activity of any kind is not a premise upon which to analyze whether or not probable cause exists in a certain case. Certainly in the case at hand, and in *Wilson,* supra, a misapplication of the mandates of this Court exists. To illustrate this, in *U.S. vs. Selby,* 407 F.2d 241 (1969), also a Ninth Circuit case, at page 242 of its opinion the court said:

"The stopping of the vehicle at Ajo and the forceable return of the Appellees as a restriction of their liberty of movement constituted an arrest."

The facts in that case were briefly that the defend-

ants approached the border at Lukeville, Arizona, and stated that they wished to enter the United States in order to get a Mexican tourist permit notarized. The inspector permitted the crossing over, and shortly thereafter another vehicle crossed the border.

Instead of returning to Mexico, however, the inspector observed both vehicles proceeding North. The inspector radioed ahead, and caused the suspects to be apprehended at Ajo, Arizona.

In connection with a subsequent search, Federal agents located marijuana within one of the panels of the door. In suppressing the evidence at page 242 of the opinion the court said:

> "In ruling that the discovered marijuana was inadmissible evidence as it had been illegally seized, the trial court reasoned that since there had been an initial inspection, the second, successful search failed to qualify as a border search not requiring probable cause. The latter examination was incident to the detention at and forceable return from Ajo. Because that taking into custody was not supported by probable cause and was hence unlawful, the lower court held that the attendant search was constitutionally unacceptable.
>
> We find this analysis persuasive and affirm the trial court's exclusionary ruling."

The trial judge in *Selby*, the Honorable James Walsh, apparently correctly applied the basic principles of probable cause. It is submitted however that his application of the principles in *Selby*, supra, and in the case herein are at odds. They are inconsistent, and the ruling herein is absolutely improper.

In *Roa-Rodriquez vs. United States*, 410 F.2d 1206 (1969), a Tenth Circuit New Mexico case, the court

said at page 1207 of the opinion: "Probable cause is something more than mere suspicion."

It is obvious that the Ninth Circuit has confusion within itself, and is at odds with other circuits in this connection. It is submitted that the law of *Burhannon*, supra, a Seventh Circuit case, which holds that mere suspicion would not constitute probable cause, is distinguishable from the court's position below in this matter where they indicated that a "founded suspicion" is all that is necessary to stop an automobile.

In *Spinelli vs. United States*, 393 U.S. 410, 89 S.Ct. 584, a 1968 case, this Court laid down the principle generally that the tips of an informer, defining of telephones, the fact that Spinelli was "a bookmaker," an associate of bookmakers, a gambler, and an associate of gamblers, was absolutely insufficient to establish probable cause, and in that connection indicated that the detailed facts given by the informant were the only bases upon which the search warrant could possible have issued. The doctrine is clearly enunciated therein that a collection of ambiguous activities, no matter how extensive, can create nothing more than mere suspicion, and that is not equivalent to probable cause.

In this case, we have a motel owner, who is apparently attempting to cooperate with Federal agents, calling an agent and telling him that "suspicious activity" is occuring at his motel with respect to persons unknown registering without putting license numbers down. Some 18 days later, the process is repeated, and upon a call to the Federal agents, the surveillance begins. Subsequent to that, some circuitous route in driving out of town by Petitioner is the sum total of the government's "suspicious conduct," upon which they rely for their

purported "probable cause" in stopping this automobile in the first instance.

CONCLUSION

For the reasons stated above, the Petition for the writ of certiorari should be granted so that this Court can consider the failure of the Court of Appeals in a flagrant manner to apply the previous mandates of this Court as to the standard necessary to justify stopping a motor vehicle in transit, and so this Court can declare that probable cause is the standard for such stops and therefore reverse this conviction because of the clear indication that nothing even approaching probable cause was known to the customs officers at the time that they stopped the Petitioner's automobile.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No.

WILLIE CALVIN JACKSON, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of June, 1970, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to RICHARD K. BURKE, United States Attorney, Federal Building, Broadway and Scott, Tucson, Arizona, and three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to the Solicitor General, Department of Justice, Washington, D.S. 20530, Counsel for the Respondent.

I further certify that all parties required to be served have been served.

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APPENDIX
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 23,084

vs.

WILLIE CALVIN JACKSON,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

ROBERTO HERNANDEZ-MACIAS,
Defendant-Appellant.

No. 23,085

[March 5, 1970]

Appeal from the United States District Court for the District of Arizona

Before: BROWNING, DUNIWAY and CARTER, Circuit Judges.

DUNIWAY, Circuit Judge:

Jackson and Hernandez-Macias appeal from a conviction under 21 U.S.C. § 174.[1] Their primary contention is that the customs agents did not have probable

[1] 21 U.S.C. § 174 "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in knowing the same to have been imported or brought into the United States contrary to law . . . shall be imprisoned not less than five or more than twenty years . . .

cause[2] to stop and search the car in which the heroin was found. We affirm.

Jackson registered at the Arroyo Motel in Nogales, Arizona, on January 20, 1968, under the name of James Smith. He did not fill in a car license number on the registration form. However, later he parked a Chevrolet in the space outside his assigned room. The owner of the motel recognized the car, and thought that Jackson was the same person who had registered at his motel three weeks before as Louis Brown and asked to rent a room for only two hours. He therefore called Customs Officer Swindler, who came to the motel at about 6:30 P.M. Swindler and other agents put Jackson's room under surveillance.

Eventually Jackson received a phone call, left the motel, drove around the corner and picked up a passenger, Hernandez-Macias. The car then took a very circuitous route through and around the downtown Nogales area, made a U-turn, and started toward Tucson, all the while followed by from one to four customs vehicles. The customs cars were unmarked and the agents wore no uniforms. After he had been informed by radio that the motel room had been completely vacated, Swindler drove his car alongside Jackson's and flashed a pulsating red light at Jackson, and ordered him to pull over. At the same time one of the other customs cars activated a siren. Instead of stopping, Jackson pulled over on the extreme right edge of the road and slowed to about

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Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

[2] Probable cause was required in this case, because there was no evidence that either of the appellants had crossed the border; thus a border search which does not require probable cause was not available to the agents.

45 miles per hour. Hernandez-Macias leaned over and opened the right-hand door, activating the dome light. The door was shut and Jackson accelerated again, reaching a speed of 80 miles per hour before Swindler stopped him, by forcing the car to the side of the road. No one saw a parcel drop from the car, and a later search of the roadside was fruitless.

After the car was stopped, the occupants were given a quick pat search. Then agent Cavitt began searching the car. At this point Jackson asked for his sweater, which was on the back seat of the car. While fetching the sweater Cavitt found a package on the floor of the car behind the front passenger seat. The agents opened the package and discovered heroin. Then Agent Swindler put the two men under arrest.

It is clear that the appellants' conduct after the agents attempted to stop them gave the agents probable cause to believe that a crime was being committed. Appellants claim, however, that such actions cannot be considered in weighing the validity of the search, because the activation of the red light was an arrest, and probable cause must have existed before that time to make the search valid.

This circuit has already considered the effect of flashing lights in order to stop a vehicle. In *Wilson v. Porter*, 9 Cir., 1966, 361 F.2d 412, we said:

> "We conclude that no right of the appellee was violated when the officers stopped the car and that the subsequent seizure of the evidence upon which he was convicted was justified as pursuant to a lawful arrest. While it is clear that at the time appellee's car was pulled over probable cause for an arrest did not exist, it is also clear that not every time an officer sounds his siren or flashes a light to flag down a vehicle has an arrest been made. . . .

> We take it as settled that there is nothing ipso facto unconstitutional in the brief detention of citizens under circumstances not justifying an arrest, for purposes of limited inquiry in the course of routine police investigations. *Rios v. United States*, 364 U.S. 253 (1960). . . .; *Busby v. United States*, 296 F.2d 328 (9th Cir. 1961). A line between reasonable detention for routine investigation and detention which could be characterized as capricious and arbitrary cannot neatly be drawn. But due regard for the practical necessities of effective law enforcement requires that the validity of brief, informal detention be recognized whenever it appears from the totality of the circumstances that the detaining officers could have had reasonable grounds for their action. A founded suspicion is all that is necessary, some basis from which the court can determine that the detention was not arbitrary or harassing." (361 F.2d at 414-15.)

See also *State v. Gunter*, 1966, 100 Ariz. 356, 414 P.2d 734, 737-38.

The agents had been told that Jackson had registered twice at the Arroyo Motel using a different name each time, and each time claiming he was afoot, but had both times later driven a car to the motel. A check of the automobile's registration showed it registered to Jackson. The agents had been told that after staying only a few hours, Jackson received a telephone call. They knew that he then drove off, picked up a passenger at a spot away from the motel, and took a very circuitous route out of town. This was some indication that he feared that he was being followed. These facts, coupled with the fact that Nogales is, in the words of the trial judge, "the gateway of all this narcotic business into Arizona," were enough to make the agents suspicious that the occupants of the car might be carrying imported contraband, and to permit them to attempt

to stop the car for the purpose of questioning its occupants to resolve those suspicions. The subsequent conduct of the car's occupants was sufficient probable cause for arrest and search.

It is true that the agents were not, like local or state police, general guardians of the public peace. They were customs agents, with duties and powers limited to activities of the type that the title implies. Within that area of duty, they have statutory authority to stop vehicles, examine them, and make arrests. 19 U.S.C. § 1581(a),(d),(e),(f); 26 U.S.C. § 7607; 19 U.S.C. § 482.

Next, each appellant contends that the statutory "presumption"[3] contained in 21 U.S.C. § 174 was inapplicable because there was insufficient evidence that he had possession of the heroin. We disagree. Hernandez-Macias' possession is adequately shown by the fact that he evidently attempted to jettison an object from the car after he must have known that the authorities were chasing him. It can readily be inferred that what he attempted to throw out was the small parcel that was found on the floor behind his seat. Jackson's joint possession is adequately shown by the fact that he cooperated with the attempt at jettisoning by slowing down and pulling over to the side of the road, then accelerating in an attempt to escape. See *Jackson v. United States*, 9 Cir., 1969, 408 F.2d 306. See also, *Bettis v. United States*, 9 Cir., 1969, 408 F.2d 563.

Hernandez-Macias argues that it was error not to declare a mistrial when Jackson testified that Hernandez-Macias had "another case" meaning that he was being

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[3] This case was withdrawn from submission while the Supreme Court considered the validity of the presumption in 21 U.S.C. § 174. *Turner v. United States*, 1970, ...U.S....., holds that the presumption is not unconstitutional as applied to heroin.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 245

WILLIE CALVIN JACKSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of Arizona, petitioner and a co-defendant, Macias, were convicted of importing heroin, in violation of 21 U.S.C. 174. Petitioner was sentenced to five years' imprisonment (R. 73–74). The court of appeals affirmed (Pet. App. 25–30).

1. The evidence is outlined in the opinion of the court of appeals (Pet. App. 26–27). It showed that one Romney, the owner-operator of a motel located in Nogales, Arizona, had informed Customs agent Swindler that at about 9:00 p.m. on January 9, 1968, a man, claiming to be travelling on foot and without an automobile, had rented a room for two hours under the name "Louis Brown". After registering, the man was

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seen parking an automobile (subsequently checked-out as registered to petitioner) in front of the room assigned to him and entering the room. Within a short period of time, a Mexican male arrived at the motel, went into the room occupied by "Brown" and remained for less than an hour.[1]

On January 30, 1968, petitioner, thought by the motel operator to be the person who had previously registered as "Brown," registered at the motel under the name "James Smith," stating at the time that he had no vehicle. However, he was seen parking the same automobile observed on January 9, 1968, in front of the room given him. (T. 72–73, see also T. 30, 37, 40, 48). Again the motel owner contacted Customs agent Swindler, who immediately came over to the motel with other agents and set up a surveillance. Soon thereafter, petitioner received an outside telephone call, emerged from his room and drove off, followed by the Customs agents (H. 6–8, 12; T. 79–85).[2]

Within 25–30 yards from the motel, petitioner picked up a man identified at trial as Macias (T. 154–155). The two men first drove on a circuitous route through the border town of Nogales (T. 115–120, 145–146, 155–156), and then headed out of town on the main highway, going north. About 14 miles from the border, agent Swindler pulled alongside petitioner's

[1] It was stipulated at trial that one Emmett Walters had accompanied petitioner to Nogales on January 9, 1968 and had registered at the motel as "Louis Brown." Walters testified that he had met with a Mexican male at the motel to pay him for providing Walters with a prostitute. The petitioner, according to Walters was asleep in his car outside the motel (T. 277–283).

[2] "H." refers to hearing on petitioner's motion to suppress; "T." refers to the transcript of trial.

automobile and turned on a red light (T. 86); the other agents to petitioner's rear turned on sirens (T. 121). According to Swindler, petitioner's car continued at the same speed and then slowed (T. 86). Another agent testified that petitioner's car moved to the edge of the road and the right door opened and closed (T. 150).[3] Petitioner thereupon accelerated to 80 m.p.h. (he had previously been driving at a maximum speed of 60 m.p.h.), at which point Swindler forced the car off the road (T. 86–87).

After identifying themselves as Customs agents, Swindler and fellow agent Cavitt ordered the two men out of the car and frisked them for weapons. Cavitt then returned to the other agents who were searching the edge of the highway in the area where the car door had been opened. On learning that nothing had been found, Cavitt rejoined Swindler and began to search the front of the car. At that point, petitioner asked for a sweater from the back seat of the car. (T. 88) When Cavitt reached for the sweater, he discovered a package on the right rear floor of the car, which, on examination, he determined to be heroin (T. 160–161).

2. Petitioner contends that the search of his automobile was unlawful because the agents did not have probable cause to arrest him at the time they

[3] Both petitioner and Macias agreed that the door had been opened. Jackson, testifying on his own behalf, stated that Macias opened the door and threw "the stuff" out (T. 321–322, 326). Macias, who did not testify in his own defense, presented a witness who testified that in jail petitioner had said that upon seeing the red light, he threw something at Macias and told him to get rid of it (T. 390–394).

sought to stop his car by use of sirens and a flashing red light. This argument misconceives the investigative authority of customs officers in these circumstances.[4] As the court below pointed out, while the agents' suspicions did not at that point amount to probable cause, there was reason to suspect that "the occupants of the car might be carrying imported contraband," and thus proper justification "to stop the car for the purpose of questioning its occupants to resolve those suspicions" (Pet. App. 28–29).[5] See *Terry* v. *Ohio*, 392 U.S. 1, 20–23. See also *Rios* v. *United States*, 364 U.S. 253, 261–262; *Wilson* v. *Porter*, 361 F. 2d 412, 415 (C.A. 9). It was the immediate response to this legitimate attempt to stop the automobile—that is, the opening and closing of the car door in an apparent attempt to throw something out and the subsequent acceleration to 80 m.p.h.—which transformed the agents' mere suspicions into sufficient probable cause to support the arrest of petitioner and his companion (see *Sibron* v. *New York*, 392 U.S. 40, 66–67) and the search of the vehicle (cf. *Chambers* v. *Maroney*, decided June 22, 1970 (No. 830, O.T., 1969)).

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[4] As the court below pointed out (Pet. App. 26 n. 2), the Customs agents' activities did not rest upon their specific authority regarding border searches (see, *e.g.*, 19 U.S.C. 482) but rather to arrest and search under 26 U.S.C. 7607.

[5] As the trial court pointed out, the road being travelled by petitioner and his companion was "the gateway of all this narcotic business into Arizona" (see Pet. App. 28). This Court has long recognized that in cases involving smuggling notice may be taken of public facts and geographic positions. *Carroll* v. *United States*, 267 U.S. 132, 159–161; *The Apollon*, 9 Wheat 362, 374.

Petitioner's reliance upon *Henry* v. *United States,* 361 U.S. 98, is misplaced since in that case the "movements [of those] in the car had no mark of fleeing men or men acting furtively." *Henry, supra,* at 103. In the instant case, petitioner's conduct prior to the agents' attempt to detain him for questioning raised founded suspicions warranting investigation. In attempting to frustrate this investigation, petitioner and his companion engaged in conduct characteristic of narcotics smugglers attempting to destroy evidence and escape, thereby providing the officers with probable cause for the arrest and search.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1970.